

Evolution of Mediation: Changes in mediation including the disappearing opening statement  
Good or bad for the mediation process?

The “Disappearing Opening Statement”

Mediation techniques vary greatly from lawyer to lawyer and from mediator to mediator. Over time, in a conscious or subconscious effort to change the perception of mediations and distinguish them from trials, several evolutions have occurred. However, recently, one of the more fluid changes has been the use of opening statements both by the lawyer and mediator. Over time, it has become apparent that adversarial opening statements by each party might have a deleterious effect on the process. At the same time, clients still may expect or demand their attorneys engage in confrontational advocacy in order to feel as though they were zealously represented. These competing interests shapes how the parties and mediator approach opening statements.

To conduct any type of adversarial opening statement by the parties, it is premised that all of the parties and mediator must have to start in a joint session with all parties present at the same time. According to a study by the Straus Institute for Dispute Resolution at Pepperdine University School of Law (Straus Institute) and the International Academy of Mediators (IAM) that garnered responses from 130 IAM members and summarized by Thomas J. Stipanowich, around 20% of practitioners don’t start in joint sessions, but rather always start in private caucuses/meetings between one party and the mediator at a time. Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISPUTE RESOLUTION MAGAZINE (Winter 2016). The other ~80% of responders had varying responses of sometimes, half of the time, usually, and always starting in joint sessions. Stipanowich noted that many mediators in California are influenced by the party attorneys who prefer to start in individual caucuses and may even refuse joint sessions or to even see the other party. *Id.* In survey results analyzed by Jay Folberg, around 45% of practitioners don’t consider the diminishing use of initial joint sessions to be either positive or negative.

In contrast, Honorable James L. Cott, a U.S. Magistrate Judge in the Southern District of New York, wrote an article for the American Bar Association Litigation Journal on the Do's and Don'ts of Settlement Conferences and emphasized that a primary downfall of many attorneys is that they are not prepared to make an opening statement at the outset of settlement conferences. Hon. James L. Cott, *From the Bench: The Dos and Don'ts of Settlement Conferences*, AMERICAN BAR ASSOCIATION JOURNAL OF THE SECTION OF LITIGATION (Winter 2016). He wrote that many judges (which is analogous to a mediator in a mediation) conducting settlement conferences require each lawyer to make a brief presentation in the presence of the other side before breaking into private sessions. *Id.* An important focus of these presentations is not just each party's position and demand, but rather the client's interests ("my client wants vindication for her unjust termination"). *Id.* Judge Cott stressed that the opening statement should not be the equivalent of a jury argument, but should only address the most significant contested issues of fact and law geared towards the other party, not the court. *Id.*

Some writers focus on the importance of an opening statement by the mediator to properly outline to proceedings. Robert A. Berlin wrote that the purpose of the opening statement from the mediator could include: an introduction of the mediator so each client has faith in the mediator; an explanation of the mediation process and the mediator's roles; assurances, rights, and entitlements of the parties; and anything else the mediator wants to include to set the stage and comfort the opposing parties. Robert A. Berlin, *The Disappearing Opening Statement* (November 2013) available at <http://www.mediate.com/articles/BerlinB2.cfm>. For the mediator to deliver an effective opening statement, it is imperative that each party prepare the mediator so that he understands both positions and weaknesses better and can help the attorney temper a difficult client. Joel Levine, *The Seven Deadly Sins of Mediation*, AMERICAN BAR ASSOCIATION JOURNAL

OF THE SECTION OF LITIGATION (Winter 2016). Berlin asserts that a mediator without an opening statement may set the mediation up for failure by not properly establishing an atmosphere that should foster good discussions and problem solving that can lead to a good resolution for both sides. Berlin, *The Disappearing Opening Statement*.

In Greg Stone's Practical Guide to Opening Remarks, he suggested that as a mediator, he believes that mediation can be a great tool if attorneys and their clients tackle a few key issues before arriving to the mediation and are prepared to discuss those issues during opening statements to facilitate a more beneficial mediation. Greg Stone, *Preparing for Mediation: A Practical Guide to Opening Remarks* (April 2013), available at <http://www.mediate.com/articles/StoneG1.cfm>. As a general matter, he suggests that parties should assess their own skills and attitudes towards conflict resolution to change the perspective that conflict is always negative. *Id.* He also emphasizes that mediation and its flexibility allow parties to handle the underlying causes of the conflict which will allow them to achieve an overall more positive result. *Id.* Lastly, he suggests that the parties assess the risk of not settling, potential trial experience, and litigation expectations. *Id.* Once those preliminary issues have been handled and briefly touched upon in the opening remarks by each party and possibly the mediator, the mediation can be more effective.

While opening statements may not be used in all mediations, many mediators and attorneys like opening statements and starting in group sessions. As noted above, in Stipanowich's analysis, he found that some California attorneys prefer to not see the other side at all, but that type of approach leads to more contentious mediations and likely fewer resolutions. It would be more effective to adopt mediator Lee Berman's observations that he has seen work like sincerely complimenting the other side (like researching an opposing doctor's credentials), empathize with the parties who deserve the sympathy to become less adversarial, and present the client and allow

them to establish their credibility and make them more comfortable. Lee Jay Berman, *Sincere Opening Statements Bring Best Mediation Results* (March 2008), available at <http://www.mediate.com/articles/bermanLJ1.cfm>. Though attorneys may not employ opening statements frequently in the future and some attorneys may dislike joint sessions, utilizing many of the points made from these various authors may make yours and your client's mediation experience much more positive.